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No. 02-1314

In the Supreme Court of the United States

STATE OF KANSAS, ET AL., PETITIONERS

v.

CHEROKEE ROBINSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because they knowingly and voluntarily waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 295 F.3d 1183. The opinion of the district court (Pet. App. 16a-63a) is reported at 117 F. Supp.2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2002. A petition for rehearing en banc was denied on October 24, 2002 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on January 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to show Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities and held that, under Section 504, "mere receipt" of federal funds was insufficient to constitute a waiver. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 244-247 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in

the suit against any public or private entity other than a State.

2. In May 1999, respondent Earnestine Robinson filed suit on behalf of her minor children and others similarly situated against the State of Kansas, its governor, and two of the State's education officials, alleging that the State's school financing scheme violates the disparate impact prohibitions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Fourteenth Amendment to the United States Constitution. Pet. App. 16a. The complaint sought prospective injunctive relief. Petitioners moved to dismiss the claims, arguing, *inter alia*, that they are immune under the Eleventh Amendment. The United States intervened to defend the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity.

The district court held that the State had waived its Eleventh Amendment immunity to claims under Title VI and under Section 504. Pet. App. 21a-28a. The district court also held that the individual defendants could be sued in their official capacities for prospective injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 28a-36a.

3. The defendants filed an interlocutory appeal challenging the district court's holding that they lacked Eleventh Amendment immunity. The Tenth Circuit did not address the defendants' immunity to the plaintiffs' Title VI disparate impact claims because, while this case was pending in the Tenth Circuit, this Court decided *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), which held that there is no private right of action to en-

force the Title VI regulations prohibiting disparate impact on the basis of race in federally funded programs and activities. Pet. App. 3a-6a. The court of appeals stated, however, that the plaintiffs could amend their complaint on remand to assert their Title VI disparate impact claims against the state officials not directly under Title VI, but under 42 U.S.C. 1983 instead. Pet. App. 4a & n.5. The court did address the validity of 42 U.S.C. 2000d-7, which conditions the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity to suits under, *inter alia*, Title VI and Section 504. The court held that, "by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit." Pet. App. 8a-9a. Accordingly, the court of appeals held that the state defendant had waived its immunity to suit under Section 504 by applying for and accepting federal funds clearly conditioned on such a waiver. The court of appeals also held that the plaintiffs could sue the defendant officials in an action under *Ex parte Young* for violations of the Fourteenth Amendment. Pet. App. 10a-13a.[1]

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[1] After the decision of the court of appeals, respondents filed an amended complaint in district court. Pet. App. 105a-138a. The amended complaint names some additional parties as defendants (compare *id.* at 105a (amended complaint) with *id.* at 79a (original complaint)), asserts the Title VI disparate impact claims as claims under 42 U.S.C. 1983 (see Pet. App. 114a-117a), and adds additional claims of intentional discrimination both directly under Title VI and, in separate counts, as claims under Section 1983 (see *id.* at 118a-124a).

ARGUMENT

The court of appeals correctly held that Congress validly conditioned receipt of federal funds on a waiver of immunity to claims under Section 504 of the Rehabilitation Act. That holding does not conflict with any decision of this Court and does not present a significant conflict with any decision of any other court of appeals. This Court recently denied petitions for writs of certiorari in *Pennsylvania Department of Corrections* v. *Koslow*, No. 02-801 (Mar. 3, 2003), *Hawaii* v. *Vinson*, No. 01-1878 (Jan. 13, 2003), *Chandler* v. *Lovell*, No. 02-545 (Jan. 13, 2003), and *Ohio Environmental Protection Agency* v. *Nihiser*, 536 U.S. 922 (2002). Those cases also presented the question whether Congress validly conditioned federal funds on a waiver of immunity for Section 504 claims. Accordingly, further review of that question is not warranted.

1. a. Section 2000d-7(a) of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." Petitioners do not dispute (Pet. 13) that Congress has the power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999). Petitioners also do not dispute that the language of Section 2000d-7 was effective in putting them on clear notice that application for and acceptance of federal funds was conditioned on and would constitute a

waiver of their Eleventh Amendment immunity to suit under Section 504.[2]

Petitioners nonetheless contend (Pet. 10-13) that their waiver of immunity to suits under Section 504 was not "knowing" because of congressional action regarding States' immunity from suit under a different anti-discrimination statute, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (ADA). For that proposition, petitioners rely primarily on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001).[3] The Second Circuit agreed with the other courts of appeals, see note 2, supra, that Section

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[2] That is the consensus of the courts of appeals. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 550-551 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Nihiser* v. *Ohio EPA*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001). Even the Second and Fifth Circuits, which have held that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, have not disputed that Section 504 may generally be applied to the States in the future, now that those concerns have dissipated. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194, at *11 n.15 (5th Cir. Mar. 24, 2003); *Garcia* v. *S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113-115 (2d Cir. 2001).

[3] Since petitioners filed their petition, the Fifth Circuit has adopted the reasoning of the Second Circuit's decision in *Garcia*. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194 (5th Cir. Mar. 24, 2003). The United States has filed a petition for rehearing en banc in *Pace*, which is currently pending.

2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4. But the court nonetheless held that the State's acceptance of clearly-conditioned funds "alone is not sufficient for us to find that New York actually waived its sovereign immunity in accepting federal funds" in that case. *Id.* at 113-114. Instead, the Second Circuit held that courts must also consider "whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity." *Id.* at 115 n.5. The Court held that that additional requirement was not satisfied because, at the time the State accepted funds, "Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity." *Id.* at 114. The court reasoned that, because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, * * * since by all reasonable appearances state sovereign immunity had already been lost." *Ibid.* (citation omitted).

The Second Circuit's conclusion about what constitutes a knowing waiver is incorrect, for several reasons. First, since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that, if it applies for and accepts federal financial assistance, part of the "contract" for receiving those funds is the requirement that the state agency consent to suit in federal court for alleged violations of Section 504. Section 504 was not amended or altered by the

enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). A state agency that applied for and accepted federal funds at any time after 1986 would have known that it was waiving its Eleventh Amendment immunity from suit under Section 504, regardless of whether it retained its immunity from suit under a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

More generally, the Second Circuit in *Garcia* erred in concluding that a State's acceptance of clearly-conditioned federal funds may be insufficient to find that a State has knowingly and voluntarily waived its immunity. Under this Court's precedents, the existence of a waiver may be found in a State's objective manifestation of assent by accepting funds that Congress has clearly conditioned on a State's consent to waive its Eleventh Amendment immunity.[4] See, *e.g.*, *College Sav. Bank*, 527 U.S. at 686 ("acceptance of the funds entails an agreement" to funding conditions). The Second Circuit's attempt to add an additional, subjective component to the analysis conflicts with this Court's recent holding in *Lapides* v. *Board of Regents of the University System of Georgia*, 535 U.S. 613, 617-619 (2002). In that case, this Court held that a State's

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[4] This objective approach is consistent with basic contract law principles under which agreement to a contract is determined by objective manifestations of assent. See Restatement (Second) of Contracts §§ 2, 18 (1981); cf. *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (observing that the Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages").

waiver of immunity turns upon its objective conduct (there, of removing a case to federal court), even though the State did not believe at the time it engaged in that conduct that it would result in a waiver of immunity. See *id.* at 621-623. In so holding, this Court specifically refused to make the unequivocal waiver question turn upon the State's subjective beliefs. *Id.* at 620-623. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621.[5] *Garcia* requires courts to engage in the difficult evaluation of States' subjective beliefs and motives, in conflict with the clear jurisdictional rule established in this Court's prior cases.

b. Petitioners also contend that the court of appeals' decision is contrary to this Court's decision in *College*

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[5] This Court's decision in *Lapides* also disposes of petitioners' assertion, in passing (Pet. 17), that the Kansas Department of Education did not have authority under state law to waive its Eleventh Amendment immunity. This Court held in *Lapides* that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law." 535 U.S. at 623. The Court then established "[a] rule of federal law" designed to "avoid[] inconsistency and unfairness." *Ibid.* The Court held that, so long as state law authorized the state attorney general to engage in the relevant litigation conduct, such conduct would constitute an effective waiver regardless of whether the official had state law authority to waive immunity. *Ibid.* Petitioners do not claim that the state education department lacks the authority to apply for and accept federal funds. Under *Lapides*, no further state law inquiry is required. Instead, whether the state's acceptance of federal funds constitutes a waiver is a question of federal law, one that Congress itself answered in the affirmative by the plain language and structure of Section 2000d-7. Moreover, petitioners failed to raise in the court of appeals any claim that the Department of Education's waiver was invalid because that agency had insufficient authority to waive its immunity.

Savings Bank v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). But, as noted above, the Court stated in *College Savings Bank* that "a waiver [of immunity] may be found in a State's acceptance of a federal grant" that was clearly conditioned upon a State's waiver of its Eleventh Amendment immunity. *Id.* at 678 n.2 (citation omitted). The Court further made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of its sovereign immunity. See *id.* at 686-687.

College Savings Bank involved a statute, enacted under the Commerce Clause, that regulated false and misleading advertising. This Court held that Congress could not condition a State's participation in interstate commerce on a waiver of its immunity to private suit for violations of the statute. However, this Court distinguished as "fundamentally different" statutes in which Congress, "in the exercise of its spending power, conditions its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and [under which] th[e] acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. This Court also reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), in which the Court held that Congress could condition the exercise of another of its Article I powers —the approval of interstate compacts—on a State's knowing and voluntary agreement to waive its Eleventh Amendment immunity from suit. 527 U.S. at 686. The Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to give money to States and

to authorize interstate compacts are "gifts" on which Congress may place conditions that a State is free to accept or reject through its actions of applying for and accepting federal funds or entering interstate compacts. *Id.* at 687.[6]

Although petitioners concede (Pet. 13) that 42 U.S.C. 2000d-7 clearly expresses Congress's intent to condition the receipt of federal funds on a State's knowing and voluntary waiver of its Eleventh Amendment immunity, petitioners also contend that Section 2000d-7 is not an effective waiver provision because it was intended to act as a unilateral abrogation of immunity, and not as a condition with which the recipient was required to agree in order to receive the federal funds. It does not matter, however, whether Congress thought that Section 2000d-7 was a clear abrogation of a State's Eleventh Amendment immunity or a clear notice that application for and acceptance of funds would constitute a waiver of a State's Eleventh Amendment immunity. Either way, the obligation is incurred only when a recipient elects to apply for and accept federal financial assistance, and either way, Congress has not imposed the requirement on the States unilaterally. If a state agency does not wish to accept the conditions attached to the funds (non-discrimination and suits in federal court), it is free to decline the assistance. But if it does

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[6] Petitioners' suggestion (Pet. 15) that applying for and receiving federal financial assistance is an "act that [a State] already has every right to take" misunderstands the distinction this Court drew in *College Savings Bank*. Unlike participation in commercial activities, a State has no right to help itself to federal funds absent some affirmative steps by Congress to offer such funds. When a State applies for and accepts federal funds, it must comply with the conditions Congress clearly places upon those funds.

accept federal money, then it is clear that it has agreed to the conditions as well.[7]

Because Congress clearly expressed its intent to condition federal funds on a State's waiver of its Eleventh Amendment immunity to private suits under Section 504, there is no requirement that a state agency's assent to the waiver be manifested in a manner apart from its voluntary action in applying for and accepting the federal funds. The same is true in other settings in which it is clear to States that a loss of Eleventh Amendment immunity will be triggered by an action completely within the control of a state agency. For example, in the bankruptcy context, the courts of appeals are in agreement that, after Congress made clear in 11 U.S.C. 106(b) that the effect of filing a proof of claim in a bankruptcy court would be the loss of immunity from claims arising out of the same transaction or occurrence, state agencies waive their Eleventh Amendment immunity by filing a proof of claim. See, *e.g.*, *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 27-28 (1st Cir. 2001) (so holding and collecting cases), cert. denied, 123 S. Ct. 73 (2002); see also

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[7] This was the Executive's understanding at the time of the enactment of Section 2000d-7. The Department of Justice explained to Congress while the legislation was under consideration that "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that, their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1420 (Oct. 21, 1986).

Lapides, 535 U.S. at 618-621 (discussing ability of the States to waive Eleventh Amendment immunity through litigation conduct).

Thus, because the decision of the court of appeals was correct, because it does not conflict with any decision of this Court, and because any conflict between the court of appeals' decision in this case and the decision of any other courts of appeals is a temporary and transitional one, see p. 6 n.2, *supra*, further review of question two is unwarranted.

2. The United States intervened in this case for the limited purpose of defending the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity, not to address the questions regarding the application of 42 U.S.C. 1983 to a claim alleging a violation of Department of Education regulations. Insofar as the United States addresses other issues beyond those for which it intervened, it does so in a capacity analogous to that of amicus curiae. Accordingly, the government did not address below the petition's substantive claims concerning the enforceability of the Department of Education regulations in a suit under Section 1983, and it does not do so here.[8]

Nonetheless, the first question listed in the petition is neither presented by this case nor one over which the court of appeals likely had jurisdiction. That question is:

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[8] None of the briefs filed in the case addressed the question whether the Department of Education regulations could be enforced in a private suit under 42 U.S.C. 1983, although the parties did call the court's attention to this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

> May a private action under 42 U.S.C. 1983 be brought to enforce disparate impact regulations promulgated by a federal administrative agency under Title VI of the Civil Rights Act of 1964?

Pet. i.

As the court of appeals realized, respondents' complaint—as originally filed and as it remained at the time of the decisions of the district court and the court of appeals in this case—did not allege a violation of 42 U.S.C. 1983. See Pet. App. 3a n.2, 4a n.5. The court of appeals nonetheless made several strong statements indicating its belief that respondents' disparate impact claim alleging a violation of federal regulations could be brought under Section 1983. See, *e.g.*, *id.* at 4a. Those statements, however, are dicta. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). The fact that, after the court of appeals' decision, respondents filed an amended complaint in district court that asserted a claim under Section 1983 did not convert the court of appeals' dicta into a holding. This case accordingly does not present the question on which petitioners assert (Pet. 5-7) there is a conflict in the circuits.

Moreover, had the question whether a private action under Section 1983 is available been an issue before the district court in this case, the court of appeals likely would not have had jurisdiction to review it. The courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. 1291. This Court has held that the "effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete." *Cohen* v.

Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). There is a small class of district court orders that are considered "final decisions" and therefore immediately appealable under the collateral order doctrine, even though they are not "final judgments." See *Abney* v. *United States*, 431 U.S. 651, 658 (1977). An order denying a defendant's motion to dismiss on Eleventh Amendment grounds falls within that class of immediately appealable collateral orders. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Accordingly, the court of appeals had jurisdiction over petitioners' appeal from the district court's order denying them sovereign immunity in this case.

This Court has suggested, however, that there is no pendent appellate jurisdiction over issues that do not themselves give rise to an immediate collateral appeal and are neither intertwined with nor necessary to ensure meaningful review of issues properly before the court of appeals. See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48-51 (1995) (rejecting pendent party appellate jurisdiction). Petitioners do not suggest that the question whether the Department of Education regulations can be enforced in a Section 1983 suit is one of the small class on which an immediate collateral appeal would be permitted, and it is not intertwined with or necessary to the decision of the Section 504 issue. Accordingly, the court of appeals likely would not have had jurisdiction to decide the first question presented in the petition. Because the Section 1983 issue was not properly presented to the court of appeals nor briefed by the parties, the court had no occasion to confront the jurisdictional question squarely. For that reason, the first question presented in the petition is not properly before this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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